THE KING'S COUNCIL AND THE CHANCERY, II.

In the previous chapter the relations of the council and the chancery were considered solely as regards the outline and structure of the courts. The subject may now be pursued further in the light of the cases for what may be revealed in matters of jurisdiction and procedure. These begin in the time when the council was wholly identified with the chancery, and afterwards continue in the privy seal department as well. From the time of this organic division, therefore, there are two branches of the original judicature, which remain necessarily very similar but with significant points of divergence.

As might be expected, the cases recorded in the chancery are by far the more complete and abundant. It was a practice of the fourteenth century to make enrollments of the most important ones with the letters close and patent, upon the calendars of which they are still accessible. But from the time of Richard II., whether because the rolls were too much encumbered, or because other means of keeping the records were more satisfactory, this usage almost disappears. The bundles of chancery proceedings which then begin are in a very faulty condition of preservation; so that for the fifteenth century, while petitions are to be found in great quantity,[1] records of the processes are scarce.

Of council cases distinct from the chancery there has been a still greater dearth, scarcely any being known prior to the time of Henry VII.[2] A number may be found, however, among the piles of miscellaneous parchments and papers of the Privy Seal Office.[3] Characteristic of the methods of this office, these were briefly written, sparing of parchment, with no signs of arrangement, and with scant care as to their preservation. Not before the time of the Tudors

[1] Collections of chancery petitions are published in *Calendars of Proceedings in Chancery* (Record Com.), I.; Baildon, *Select Cases in Chancery*; William Salt Archaeological Society, *Collections of Staffordshire,* new series, VII. 340–393; *Archaeologia,* LIX. 1–24, LX. 353–378; Société Jersiaise, *Ancient Petitions of the Chancery and the Exchequer* (Jersey, 1902).

[2] Several cases between 1477 and 1487 have been collected in Leadam, *Select Cases in the Star Chamber,* Selden Society (London, 1903), XVI. 1–16.

[3] These I have found especially in the newly compiled lists of the Warrants Privy Seal, series I., section II. Some which are still unlisted I have by favor been permitted to see. These I can only indicate as in the "Exchequer Box" or "Chancery Box".

apparently did the practice begin of throwing them together in bundles. Still for the earlier period they may be counted by hundreds, attesting a constant activity of the council in this direction. Most of them consist only of the petitions, upon which it was enough simply to endorse the judgments and orders of the council. A few, however, contain at one stage or another the hearings at length, and reveal more of the procedure of the council even than any of the contemporary chancery records. With the material, fragmentary as it is, from both sources a fairly complete view may be obtained of the judicature, which at first belonged alike to the council and the chancery, and which in time came to be divided between them.

A field of jurisdiction can hardly be defined at first. In general, from the reign of Henry III., suitors addressed petitions to the king or to the council by reason of their difficulties at common law. At this time the council did not regularly hear the cases but confined itself to directing the writs and processes which were to be followed in the ordinary courts. In this way the council was mainly a court of resort in questions of procedure. Even when the parties were summoned to appear their cases were generally committed to another court for trial. At times, it is true, the council sat in the exchequer and in the king's bench, but then it was not as a separate court. Such few cases as the council consented to hear were more likely because of the prominence of the parties and of the interests concerned than because of the nature of the litigation. Only as the courts of common law failed or proved inadequate did the council receive cases of certain kinds and become itself a court of special jurisdiction. In this regard there is no evidence that the council anticipated the wishes of the people.

The class of cases which came to have the greatest prominence includes the crimes of great violence, described as riots, armed attacks, unlawful assemblages, robberies, "heinous trespass", "misprision", abduction, and other evils familiarly associated with the practice of maintenance. Outrages such as these were far from uncommon throughout the fourteenth century, but for a long time only common-law remedies were applied. Petitioners generally asked for such, and the most vigorous actions taken were through the special commissions of *oyer et terminer*, which for a time were widely sought and employed.[4] None of these methods were sufficient, however, against the wrongs of maintenance. Petitioners declare that they cannot sue at common law,[5] that they dare not pur-

[4] Calendars, *passim*; *Rotuli Parliamentorum*, I. 290.

[5] Ancient Petitions, no. 10626.

sue even by *oyer et terminer*,[6] that officers are in collusion with wrongdoers,[7] that sheriffs refuse to serve writs,[8] that bailiffs will not arrest,[9] and that juries are controlled.[10] In the reign of Edward III. plaintiffs in the greatest distress began to ask for hearings before the council rather than before the commissions.[11] Even then the cases were more frequently committed to *oyer et terminer* processes, until in the reign of Richard II. this jurisdiction was plainly assumed by the council[12] and even ascribed to it.[13] From this time the number of such cases increases beyond all estimation. At the beginning of Henry VI.'s reign there is mention of a special file of "riot bills" in a single session of Parliament.[14] It is noteworthy that the early petitions to the chancellor, already described, were mainly burdened with grievances and appeals of this nature. Indeed at that time this jurisdiction belonged to the chancery as positively as to the council.

A group of cases, which was somewhat earlier than the former to be recieved by the council as requiring an extraordinary jurisdiction, may be classified as those of *fraud*. Of these many relating to forged charters,[15] false claims,[16] counterfeit money,[17] covin and procurement,[18] covenants extorted under duress,[19] malicious indictments,[20] and others of the kind were consistently heard by the council in chancery under Edward III. A good illustration is found in a case in which a deaf and dumb girl was proved to have been imposed upon by guardians who obtained from her a fraudulent enfeoffment.[21] That jurisdiction of this kind properly belonged to the chancellor and council was further declared by the statutes assigning to them crimes of misdemeanors in office[22] and false accusations,[23]

[6] Ancient Petitions, no. 12298.
[7] *Ibid.*, no. 15200.
[8] *Ibid.*, no. 14969.
[9] *Ibid.*, no. 15200.
[10] *Ibid.*, no. 12824.
[11] *Ibid.*, nos. 12298, 12549, 13443.
[12] In 21 Rich. II. a commission was asked for but the council heard the case. *Ibid.*, no. 13111.
[13] *Rot. Parl.*, III. 21.
[14] Early Chancery Proceedings, bundle 5, no. 41.
[15] *Cal. Pat. Rolls*, 22 Edw. III., p. 131; *Cal. Close Rolls*, 24 Edw. III., p. 225; Close Roll, 42 Edw. III., m. 8 d.
[16] Unlisted document, petition of Hamon Lestineur, "Exchequer Box".
[17] *Cal. Pat. Rolls*, 24 Edw. III., p. 595.
[18] Ancient Petitions, nos. 11302, 12264, 12287, 14937.
[19] *Ibid.*, nos. 11028, 15149.
[20] *Ibid.*, no. 15571.
[21] Close Roll, 49 Edw. III., m. 13 d.
[22] Statutes, 20 Edw. III., c. 6; 36 Edw. III., c. 9.
[23] *Ibid.*, 37 Edw. III., c. 18: 38 Edw. III., c. 9; 42 Edw. III., c. 3; 17 Rich. II., c. 6.

of which there were a number of instances.[24] It was in the fraud cases, many of which were intangible to the common law,[25] that the special procedure of the council may first be observed. Requiring the inspection of documents and the searching of records, this jurisdiction was properly inherited by the later court of chancery, whose clerks were the acknowledged experts in these matters.

A class of cases considered to be above the jurisdiction of the ordinary courts were those especially affecting the king's interest and dignity. Among these were charges of treason, conspiracy,[26] espionage,[27] evasion of the customs,[28] and contempt. Arraignments for contempt were incurred by defying the orders of a court or a prohibition of the king, or by pursuing litigation contrary to an existing judgment.[29] The royal rights too in ecclesiastical presentations, particularly when there were collisions between those having claims from the pope and those from the king, gave rise to an indefinite number of disputes.[30] Certain free chapels of the king, for instance, were declared to be exempt from the authority of all other courts.[31] Many of the cases were anterior to the statutes of provisions and *praemunire*, which recognized and strengthened the jurisdiction thus assumed.[32] It was the king's right also by a prohibition or other form of order to reserve cases for hearing before the council.[33]

Another group, which may be explained as arising outside the area of the common law, may be designated as maritime and international. Seizures at sea, piracies, shipping claims,[34] questions of wreck[35] and contraband,[36] were among the earliest to require spe-

[24] Chesterfield case, Close Roll, 39 Edw. III., mm. 26–23.

[25] Ancient Petitions, no. 12168, 22 Edw. III., is an instance in which a charter, which was being used in a case pending before the king's bench, was proved a forgery before the king and council.

[26] *Ibid.*, no. 15119.

[27] *Cal. Pat. Rolls,* 22 Edw. III., p. 151.

[28] Ancient Petitions, no. 14915; *Cal. Close Rolls,* 21 Edw. III., p. 241.

[29] These are very numerous. *Cal. Close Rolls,* 17 Edw. III., p. 265; *Cal. Pat. Rolls,* 15 Edw. III., p. 548, 18 Edw. III., p. 284, 22 Edw. III., pp. 66, 165, 23 Edw. III., pp. 315, 317, etc.

[30] Ancient Petitions, nos. 14898, 15074; *Cal. Pat. Rolls,* 20 Edw. III., p. 229, 23 Edw. III., *passim.*

[31] For example, Bosham, *Cal. Close Rolls,* 29 Edw. III., p. 157, 30 Edw. III., p. 288; Hammepreston, Ancient Petitions, no. 15074.

[32] Statutes, 27 Edw. III., c. 1; 38 Edw. III., cc. 2 and 3; 16 Rich. II., c. 5.

[33] Bosham case; and *Cal. Close Rolls,* 32 Edw. III., p. 540; *Cal. Pat. Rolls,* 8 Rich. II., p. 462.

[34] *Cal. Pat. Rolls,* 23 Edw. III., pp. 83, 319; *Cal. Close Rolls,* 23 Edw. III., p. 65, 26 Edw. III., p. 425; Close Roll, 39 Edw. III., m. 5, etc.; Ancient Petitions, nos. 14930, 15124, 15155.

[35] Ancient Petitions, no. 14955.

[36] *Cal. Pat. Rolls,* 20 Edw. III., p. 135; *Cal. Close Rolls,* 32 Edw. III., p. 384.

cial treatment, and by the reign of Richard II. were extensive enough to give rise to a new jurisdiction under the admiral.[37] Analogous to these were disputes in which foreigners, especially merchants, were involved. It was by special favor that the king opened his court to a foreigner.[38]

By the king's grace also the council and the chancellor were accessible to suitors who, from poverty or legal disability, were unable to sue elsewhere. Petitioners humbly representing themselves as "your poor clerk", "your simple and poor wax-chandler",[39] "poor tenants", "poor mariners", or as "reduced to poverty and misery" had a special claim to attention which was recognized in various ordinances.[40] A plaintiff who as a married woman would have had no standing in an ordinary court was heard in the noted Audeley case, wherein a wife makes a claim based on a pre-marital covenant which her husband's family was unwilling to carry out.[41] The field of special jurisdiction, therefore, was wide and well established before the special equity cases of uses, contracts, and injunctions began to be received in the fifteenth century.[42]

The growth of this extraordinary jurisdiction was always regarded with jealousy and dislike by the lawyers and by Parliament, who nevertheless accepted it as necessary and inevitable. But the further tendency to encroach upon the sphere of the ordinary courts, hearing cases "touching the common law", was energetically resisted and caused a continuous struggle in Parliament, marked by perpetual complaints and intermittent attempts at restrictive legislation. In the twenty-fifth year of Edward III. the Commons demanded that no man should answer for his freehold or for matters of life and limb before the council, but the king consented to the restriction only as regards freeholds.[43] This limitation the council was to some extent careful to observe, returning a number of cases for this reason to the common-law courts,[44] not to the

[37] Marsden, *Select Pleas in the Court of Admiralty*, Selden Society, VI. (London, 1892). An early instance of a case before the admiral and council occurs in 26 Edw. III. *Cal. Close Rolls*, p. 425.

[38] Ancient Petitions, nos. 13056 (from a poor man of Rouen), 10449 (from an alien prior, *temp.* Edw. III.). The lord of Enghien to clear himself of a charge against him in Flanders came before the king and council. *Cal. Close Rolls*, 25 Edw. III., p. 351. Also a case of the Duchess of Guelders is in Ancient Petitions, no. 12352.

[39] Ancient Petitions, no. 15145.

[40] *Proceedings of the Privy Council*, III. 150, 217.

[41] Close Roll, 40 Edw. III., m. 15; 41 Edw. III., m. 13.

[42] Holmes, "Early English Equity" in *Select Essays* (ed. Wigmore, Cambridge, 1908), II. 705–736.

[43] *Rot. Parl.*, II. 228.

[44] Ancient Petitions, nos. 12289, 12299.

satisfaction of Parliament, however, for the act was repeated under Richard II.[45] In spite of much subsequent legislation this law remained the only restriction of definite character which the Parliament ever succeeded in making. Complaints against the special writs and processes were unavailing, while ordinances, re-enacted with great persistence, to the effect that matters touching the common law should be determined in the ordinary way, with a usual saving clause, "unless it were against such high personages that right could not be obtained elsewhere",[46] or as again expressed, "unless there be too much might on the one side and too much unmight on the other",[47] were indefinite and left the discretionary power of the council undiminished. A characteristic fitful action, of no enduring effect, occurred after the fall of Richard II., when all cases of this nature pending before the council were quashed and turned over to the common law.[48]

Any distinction between the jurisdiction exercised by the chancellor and by that reserved to the council was slow to appear. At the time of Richard II. there was none.[49] Appeals to the chancellor on whatever subjects were made primarily to gain a hearing, and cases of violence were as likely to be brought to him[50] as were trust cases a little later before the council.[51] The first usage which was at all consistently observed cannot be predicated prior to the reign of Henry VI., namely that violence cases belonged to the council. Parliament turns its file of riot petitions over to the council,[52] and again a petition on violence though addressed to the chancellor is heard *coram consilio*.[53] On the other hand, land controversies were brought more to the chancellor, so that by the reign of Edward IV. certainly most of the petitions addressed to him were on disputed property claims.[54] If one were to assign a reason it would be that while great criminal trials required the power and expedition of the privy seal procedure, claims to title sought the security afforded by the instruments of the great seal. No clearer

[45] *Rot. Parl.*, III. 21, 323.

[46] *Ibid.*, III. 21.

[47] *Proceedings of the Privy Council*, I. 18 a, III. 214; *Rot. Parl.*, III. 446, IV. 201 b, 343.

[48] *Rot. Parl.*, III. 446.

[49] In this I dissent from Mr. Baildon's opinion that the council's jurisdiction from the beginning was mainly criminal. *Select Cases in Chancery*, Selden Society (London, 1896), p. xvi.

[50] Chancery petitions already quoted.

[51] *Proceedings of the Privy Council*, II. 328.

[52] Early Chancery Proceedings, bundle 5, no. 41.

[53] Unlisted document in "Exchequer Box", marked 104/4.

[54] See collections mentioned p. 744, n. 1.

distinction than this, however, was made prior to the statute *pro camera stellata* of Henry VII.

More distinct than the realm of jurisdiction were the methods of procedure which gave the council its advantage over the common law. In the earliest cases, whether in the exchequer or the chancery, no divergence from the common law is shown; but under the chancellors, assisted no doubt by other bishops and by certain doctors of civil law who were at various times retained in the council,[55] there appear in time the influences of the canon law. Certain features were directly derived from the practice of the ecclesiastical courts, while other forms entirely peculiar were developed. Yet so late as the reign of Henry V. traces of common-law procedure have been shown to be confused with that of equity.[56] Here again the council and the chancery, while following many usages in common, were different in certain essential respects.

The beginning of all special procedure, it is understood, lay in the petitions already mentioned, by which suitors applied for remedy which they could not obtain in the normal way. As petitioners themselves sometimes declared, having sought relief in vain, they could only proceed by complaint.[57] Written at first in French and later in English, the very form of the petitions suggests a departure from the ordinary legal procedure. In nearly all of the cases at first the most that was required was an order as to the necessary writs and processes to be pursued. Only as the council received or committed cases did the petition or "bill", as it was also called, become the basis of litigation. This was known as "procedure by bill", in distinction from that by original writ. As the petitions readily numbered by the thousands,[58] elaborate arrangements were made for receiving them. They were properly presented to the chancellor or other minister, when at each session of Parliament hearers or triers of petitions were appointed for dealing with them.[59] The greater bulk of the bills no doubt were always handled by these committees, who endorsed them with the necessary directions. For

[55] My article, *English Historical Review* (1908), XXIII. 1–14.

[56] Pike, *Law Quarterly Review*, I. 445–453.

[57] Lucy Langton (*temp.* Edw. III.) declares that on coming to London she was detained and robbed. She asks the chancellor to have the parties brought before him, as she has nothing in the common law to defend her. Ancient Petitions, no. 15011.

[58] A thorough investigation of the 16,000 petitions contained in the files of Ancient Petitions has never been made. Besides these there are many hundreds in other files, particularly in the Warrants Privy Seal. The difficulty of identifying them in regard to date is of course very great.

[59] As to the hearers and triers of petitions a good account is given in Hale, *Jurisdiction of the Lords' House*, ch. XII.

treating the bills left over from Parliament and those received at other times, the council was the principal agency, which likewise was overburdened with the work. It was pressure of business primarily which caused the differentiation of chancery petitions already described, by which an advantage was gained that they were not brought to Parliament. At about the same time another differentiation appears in the form of petitions addressed to the lords of Parliament,[60] which are thereby distinguished from council petitions.[61]

In spite of all other agencies the attention of the council was still so much taken with the hearing of petitions that higher interests were endangered. Ordinances were made that the business of the king and the realm should have the precedence,[62] that petitions of the people might be considered in the presence of a limited number,[63] that Wednesdays should be especially reserved for the hearing of petitions,[64] that the petition of the poorest suitor should be considered first.[65] The council in fact could not read all of the bills brought to it, on one occasion, at the close of a term, ordering that the determination of all petitions remaining unheard should be committed to the lord chancellor and the chancery.[66] To obtain the attention of the council suitors sought still other avenues of approach, in some instances addressing their petitions not only to the chancellor, to the treasurer, to the steward of the household,[67] but also to other prominent councillors like the Duke of Lancaster,[68] the Earl of March,[69] the Duke of Exeter,[70] the Duke of Albemarle,[71] the Duke of Bedford,[72] and the Duke of Gloucester.[73] An expedient

[60] The earliest petition of this kind which I have been able to find is that of Sir Hugh Wrottesley to the Duke of Lancaster and other lords of Parliament, in 1 Richard II. Ancient Petitions, quoted in *Collections of Staffordshire,* new series, VI. 148. See also *Rot. Parl.,* III. 60 b, *et seq.*

[61] *Rot. Parl.,* III. 163.

[62] *Proceedings of the Privy Council,* I. 18 a.

[63] *Ibid.,* I. 18 b.

[64] *Ibid.,* III. 149, 214.

[65] *Ibid.,* III. 150, 217.

[66] *Ibid.,* III. 36.

[67] One *c.* 1371 is addressed "au noble et puissantz Seigneur Monsieur Henry le Scrop et as sages conseulx notre Seigneur le Roi". Ancient Correspondence, vol. L., no. 146.

[68] "A tresreverent et treshonorable Seigneur le Roi de Chastill et Duc de Lancastre et a tressage conseil notre Seigneur le Roi." Ancient Petitions, nos. 10406, 12595, 12596.

[69] An unlisted document.

[70] Warrants Privy Seal, series I., section II., file 3.

[71] Unlisted.

[72] Warrants Privy Seal, series I., section II., *passim.*

[73] *Ibid.*

more often tried was for suitors in some way to secure the interest of one or another of the councillors in their petitions, who signed their names as sponsors upon the bills.[74] Members of the council were importuned for their influence, and to such an extent was there opened the way for favoritism that one of the most reiterated ordinances was that councillors should grant no favors to suitors but should only answer that their petitions would be seen by all of the council and answered.[75] A rule was made also that the bills which were considered by the council on a Wednesday should be returned to the petitioners on the following Friday.[76]

As a large number of the complaints consisted of criminal charges the way was opened for all kinds of false and malicious accusations. Against this evil there was the act of Edward III., several times repeated, requiring that accusers offer security to prove their suggestions.[77] In the *plegii de prosequendo,* as the pledges were termed, this law was observed with fair consistency[78] in the council as well as in other courts. But as the council became the great tribunal for state cases, it was also open to secret information known as suggestions or depositions.[79] Bills were even offered anonymously, one suggesting that a writ of summons be directed to a man,[80] another naming a certain monk who was pointed out as a spy.[81] There is also, in the reign of Richard II., an extensive pamphlet of anonymous origin, making wide and indefinite charges against the unpopular Alexander Neville, archbishop of York, suggesting that he should be arraigned for his extortions, maintenances, and tyrannies.[82] It is likely too that secret suggestions were largely unwritten. The council encouraged information of this kind, on one occasion offering a reward to those reporting evasions of the customs,[83] and again giving assurances that the informers would

[74] *Proceedings of the Privy Council,* I. 35, 72, 78, etc.

[75] *Ibid.,* III. 149, 214; IV. 60.

[76] *Ibid.,* III. 149, 214.

[77] Statutes, 37 Edw. III., c. 18; 38 Edw. III., c. 9; 42 Edw. III., c. 3; 17 Rich. II., c. 6.

[78] Baildon, *op. cit.,* p. xxv.

[79] Statutes above mentioned.

[80] Ancient Petitions, no. 14948.

[81] *Ibid.,* no. 15176.

[82] "The comunes of Ingelonde werfor blame the Kyng and his conseil of the unhappe and disese and myschief of the Reaume . . . Were Kynge Alisaundre wel examyned of his extorciones and his meyntenances and his tyrrantrie of that he hath take falsly ageyne the Kynges lawes he shuld leve for ever the Kynges lx. ml. li." Parliamentary Proceedings (Chancery), file 9, no. 22. For this reference I am indebted to Mr. Charles Johnson.

[83] "Quicunque ad nos et consilium nostrum volentes accedere ad nos et consilium nostrum informandum habunt pro labore suo sufficiens rewardum." Close Roll, 10 Rich. II., m. 15 d.

be heard.[84] In the reign of Henry IV. a deposition of this character is found in which one William Stokes, declaring it to be the duty of every loyal subject to safeguard the honor and profit of the crown, informs the council of certain illegal exportations of wool and skins.[85] Whether for this or other services the informer was not without reward.[86]

Next in order were the writs of summons and arrest to bring parties before the council. In this respect as in others there was at first nothing extraordinary in the council's procedure. From the reign of Edward I. were used the ordinary writs both of the exchequer and the chancery, among which are recognized the *monstravit,* the *scire facias,* and the *venire facias.* Another mode of compelling attendance was to make some one responsible, *corps pour corps,* for the appearance of a party on a certain day. It was a marked advance in point of procedure, when in the reign of Edward III. certain writs of summons, especially adapted for the purposes of the council and the chancery, were framed; namely the *praemunire,* the *quibusdam certis de causis,* and the *sub poena.*[87] These differed from any corresponding instruments of the common law in their summary character. They specified no reasons, they demanded the presence of parties for certain causes, and for disobedience made a threat, which in the more extensively used subpoenas was stated in the form of a fixed money penalty. Issued under the king's seal, they were generally unrestricted in penetrating franchised districts,[88] they superseded any commissions or rights to the contrary, and were calculated to command an obedience such as the orders of no other court could. Without the sanction of Parliament they could hardly claim legal character, and so were never registered. Although these writs were originally devised in the chancery and issued under the great seal, they were subsequently sent forth almost entirely under the privy seal, not only for summons to the council but to the chancery as well.[89] In addition to all that has been said concerning the usages of the privy seal, a marked

[84] Close Roll, 12 Rich. II., m. 19 d.

[85] British Museum, Cotton MS., Galba BI, nos. 23, 24.

[86] *Cal. Pat. Rolls,* 1 and 2 Hen. IV., pp. 322, 431.

[87] An adequate description of these writs is given in Palgrave, *Original Authority,* pp. 40–41.

[88] In regard to the duchy of Lancaster and other liberties having a chancellor, letters of the great seal were commanded to be issued through their own chanceries. Statutes, 31 Hen. VI.

[89] On this point Palgrave is quite misleading, speaking of the privy seal writs as though they were different from the *sub poena* (*op. cit.,* p. 86). This writ was the same under either seal, in the French form being designated as *le brief sur certain peine.*

advantage afforded by the later method in regard to the writs is seen in the fact that whereas letters of the great seal were regularly delivered through the agency of the sheriffs, those of the privy seal were carried by *pursuivants* or special messengers directly to the parties addressed.[90] In fear of the sheriffs, who were likely to be in league with their enemies, plaintiffs therefore asked for "writs direct". So essential a part of the council procedure were the writs considered that it was for them specifically that suitors prayed, and against them that the opposition in Parliament was directed. They were incorrectly stigmatized as a novelty, which had never been known before the time of Richard II.[91] It was further urged, without success, that the cause and matter of the suit be put into the writs and that they be enrolled and made patent without being returned.[92] They were still regarded as at least extra-legal when, in the thirty-first year of Henry VI., under stress of the great disorders of Jack Cade's rebellion they were temporarily legitimatized in riot cases only.[93] In accordance with the statute then enacted it was claimed that the writs should contain the words *de riottis*.[94] With all of their cogency, however, such was the lawlessness of the times that in the later years of Henry VI. the evasion and defiance of the king's writs was acknowledged to be very general,[95] and one finds the subpoenas returned with explanations that the parties would not receive them, that they absented themselves and could not be found.[96]

At the time appointed it is described as customary for the name of the party to be cried at the door of the council chamber.[97] A feature of canon-law procedure introduced by the chancellor at an early date was the swearing of the parties, both plaintiffs and defendants, upon the Gospels to tell the truth,[98] who were thereby

[90] Frequent payments to such messengers are found in the Issue Rolls, *passim*.

[91] *Rot. Parl.*, IV. 84 a.

[92] *Ibid.*

[93] Statutes, 31 Hen. VI., c. 2.

[94] One party was successful in resisting a summons because it did not contain the words *de riottis*, as authorized by Parliament. Certain six articles, 35 Hen. VI., "Exchequer Box".

[95] Statutes, 31 Hen. VI., c. 2.

[96] Unlisted documents. One of 35 Hen. VI. contains six articles testifying that the writs privy seal which were issued in accordance with the statute of the thirty-first year, were of no avail in summoning the parties.

[97] One of the returned writs under Henry VI. bears the following statement: "vocatus in dictis Octavis ad Hostium camere prout moris est non comperuit." Unlisted document, "Chancery Box". Of the time of Richard II., it is once said, "solemniter vocatus non venit." Ancient Petitions, no. 11059.

[98] Parties were "iurez et examinez en la chauncellerie" about the first year of Edward III. Ancient Petitions, nos. 10608, 10640; also Close Roll, 12 Rich. II., m. 19 d; Warrants Privy Seal, series I., section 11., file 3, etc.

placed at the disadvantage of testifying against themselves. By an early confession[99] or by an accord[100] which the litigants were frequently advised to make, the case might be ended at once. The parties further committed themselves by making submission to the court, *in alto et basso,* agreeing to abide by its decision. Since no one could well be bound by an extra-legal procedure against his will, this act was essential, it being once declared that without the submission the trial could not go on.[101] In criminal cases a very frequent action in the chancery, where a record could be made, was that of *mainprise,* which might be either a preliminary or a final step. This was to place the parties under bond and surety, guaranteed by *mainpernors,* to keep the peace for a certain time or to appear at a certain day.[102] Sometimes the amounts were as high as £5000 or £10,000. As a deterrent against false accusations plaintiffs were also bonded to prove their complaints.[103] Failing to furnish bonds, men were sent to prison whether under conviction or not. It was once declared to be a hardship that in order to find security parties were induced even to compound with their enemies.[104]

At any of its stages the case might be committed for trial and decision to another court, but if it was heard at length by the council the procedure was somewhat as follows. The hearing was opened with the reading of the bill, when in civil actions an adjournment was taken to allow the defendant time to prepare his case, which he might do with the aid of counsel.[105] All matters of evidence so far as possible the council preferred to have in writing.[106] The answers of defendants were given written form even in the reign of Edward III.,[107] and in the fifteenth century were regularly prepared in this manner together with replications and

[99] In one instance a clerk accused of falsifying a record on being spoken to before the council acknowledged his act. *Cal. Pat. Rolls, 22* Edw. III., p. 113.

[100] In a case of *22* Rich. II. the parties were commanded to treat and make an end themselves if they could accord. Ancient Petitions, no. 12549.

[101] Audeley case, Close Roll, 40 Edw. III., m. 15; 41 Edw. III., m. 13.

[102] Close Rolls, Edw. III. and later.

[103] Statutes mentioned on false suggestions. An instance is in Close Roll, 51 Edw. III., m. 6 d.

[104] *Rot. Parl.,* IV. 84 a.

[105] Defendant takes a copy of the charges that he might reply with the aid of counsel. Ancient Petitions, no. 13111.

[106] It seems that complaints were not always presented in writing. Thus in the reign of Henry V. a plaintiff was directed to put her grievances in written form. *Proceedings of the Privy Council,* II. 286.

[107] In the Spynk case, "respondit in forma que sequitur." Patent Roll, 38 Edw. III., pt. I., m. 15.

rejoinders.[108] A counter-petition was sometimes offered by the defendant.[109] Suitors were instructed to be fully informed as to their contentions and were likely to bring charters, letters, and other instruments. Other than the parties immediately concerned, witnesses were rarely summoned, although in a few instances they do appear.[110] Matters of evidence from outside sources were regularly obtained by writs of *certiorari* or of inquisition, directing sheriffs to employ juries, the courts and other authorities to search their records and return the information.

In criminal cases if the facts could not be determined by any of the simpler methods, resort was taken to the most drastic means within the power of the council, namely, the inquisitorial examination. The practice of putting the parties, particularly the defendant, to the task of answering questions under oath was directly borrowed from the ecclesiastical courts.[111] While nothing was more antagonistic to the practice of the common-law courts,[112] this method proves to have been not unknown also in the exchequer.[113] From the accusations or depositions of the plaintiff questions of fact were drawn up in a series of articles and addressed to the defendant, whose answers were noted.[114] Any discrepancies or self-contradictions in his admissions were quickly turned to his disadvantage and were likely to cause him to break down and confess,[115] while if there were more than one defendant examined inconsistencies in the testimony were all the more probable. Although the examinations were assailed as a subversion of the common law, in an age when the art of cross-questioning was unknown in the regular courts, the need nevertheless of the Star Chamber procedure is manifest. That the examinations were held in secret and "without any record or entry", was another objection expressed in Parlia-

[108] A notably early instance of a replication is found in 24 Henry VI.: "Replicatio Martini et Stephani contra responsionem Johannis Gubbe". Diplomatic Documents, Chancery, no. 525.

[109] John Cheyne *v.* William Brian, 13 Rich. II., unlisted in "Exchequer Box".

[110] In a case of an erroneous writ a clerk whose name was on the writ was brought in and questioned. Close Roll, 12 Rich. II., m. 19 d; also Baildon, *op. cit.*, nos. 95, 126; *Calendars of Proceedings in Chancery,* vol. I., pp. xix, li, etc.

[111] *Cal. Close Rolls*, 30 Edw. I., p. 565, 24 Edw. III., p. 225; Close Rolls, 39 Edw. III., m. 26, 49 Edw. III., m. 40 d; Patent Roll, 40 Edw. III., pt. 1., m. 11, etc.

[112] "Solonc la fourme de ley cyvyle et ley de Seinte Esglise, en subvercion de votre commune ley." *Rot. Parl.*, IV. 84 a.

[113] Memoranda Roll, L. T. R., 28 Edw. III., m. 28; transcribed in Putnam, *Enforcement of the Statutes of Labourers* (New York, 1908), app., p. 290.

[114] See articles of accusation in Chesterfield case, Close Roll, 39 Edw. III., mm. 26–23.

[115] *Ibid.*

ment.[116] They were, however, already under Edward III. in written form, as is indicated in one case by the mention of a roll containing the articles handed to the chancellor.[117]

As an illustration of this procedure there is a remarkable privy seal record of a typical Star Chamber case which was heard in the seventeenth year of Henry VI.[118] Attached to a petition is a small roll or fold of paper, written by the clerk of the council, containing the articles of examination with the answers of the defendants concerning the recent Bedford riot.[119] Unlike chancery cases the record is in English. Four of the king's justices of the peace and of *oyer et terminer* had certified that Lord Fanhope with forty-five armed men invaded their court in riotous manner, insulting the judges and breaking up the session. Thereupon Lord Fanhope, who was placed under fine and security, addressed a petition to the king, denying the truth of the charges and asking that an examination be made. The petition was referred to the council, who proceeded to examine the justices on oath in a manner that was said to be severe. The questions consisted of nine articles on the matters of fact contained in their former allegations, as to the number of men, as to the conduct of his lordship, as to their own conduct, and the like. These were addressed in turn to each of the four defendants, and their answers taken. When upon subsequent perusal certain discrepancies in their assertions were found, especially in comparing the answers with the original certification, the judges, though still maintaining the truth of their charges, were forced to admit that they had been moved by motives of anger and malice. The council, therefore, found the charges false and so must have reported to the king, who then commanded the chancellor by a letter of the privy seal to issue a patent of pardon and release for Lord Fanhope. For a record which his lordship desired, this was enrolled after the manner of the chancery with a brief summary of the case.[120] The council would seem to have dealt leniently with the lord, as to whose conduct in breaking up the court the essential facts were not denied, but it was considered that he had not been without excuse.

[116] *Rot. Parl.*, IV. 84 a.

[117] Chesterfield case, *supra*.

[118] "The kings counsaillours examined the persones whoos names here on follow upon the Ryot that was doo at Bedford the XII[e] day of Januar the yere above seid." Unlisted document, "Exchequer Box".

[119] "Hi sunt articuli examinationum quattuor partium sequentium infrascritarum videlicet . . . et responsiones ad eosdem articulos." *Ibid.* One-half the manuscript is torn away but what remains is enough to give a clear observation of the proceedings.

[120] *Cal. Pat. Rolls*, 17 Hen. VI., p. 246.

The examinations being the most laborious and technical part of the procedure, it is plain that not many could be held before the council at such length. On one occasion, when an examination was pending, the lords declared that under the many burdens imposed upon them they could not go on with it.[121] Already in the reign of Edward III. the practice of committing inspections and examinations to certain members, or to the chancellor alone, had begun.[122] Inspections of documents could be left to the chancery clerks.[123] The appointment of committees of examination for civil as well as criminal cases came to be a regular practice, of the council more than of the chancery, during the fifteenth century. A number of the justices were usually included, who were declared to be so much occupied in this way as to be kept from their ordinary duties of hearing pleas.[124]

Among the few existing records of such examinations is a noteworthy one of the thirteenth year of Richard II. which explains itself by the following notes: "Les nouns de ceux qi feurent deputez par les conseil du Roy pur examiner [les matires] comprise deinz ceste bille et autres evidences purposeez", etc. The names follow. Later, "le dit conte [of Northumberland] par lui et par les deputez susditz fesoit relation au conseil du Roy qe", etc.[125] As the foregoing note suggests, the committee was to make a report or "relation" to the council of its findings. The council was likely to act and might even agree to act in accordance with the report.[126] The final relation too might be waived, when the parties were induced to submit to the verdict of the committee.[127] To a great extent the committees of examination superseded the older method of delegation to commissions of *oyer et terminer*,[128] a change which possessed certain manifest advantages over the earlier method. Whereas the commissions followed the common-law procedure, the

[121] "Propter varia et ardua eis per dictum dominum Regem injuncta negocia intendere minime potuerunt." The examination was committed to a bishop and a lay member. *Proceedings of the Privy Council,* I. 190–192.

[122] The king caused further examination to be made by some of his council. *Cal. Pat. Rolls, 22* Edw. III., p. 131.

[123] Ancient Petitions, no. 10608.

[124] *Rot. Parl.,* IV. 84 a.

[125] An unfiled document in the "Exchequer Box". See also one of 4 Hen. IV.

[126] *Proceedings of the Privy Council,* I. 192.

[127] There is an instance in which the parties agreed to accept the judgment of the justices, but afterwards one of them wished a decree of the council. *Proceedings of the Privy Council,* II. 333–335; also *ibid.,* III. 165.

[128] The commissions were by no means abandoned. There is an instance in which a complaint, having been examined by certain lords and justices of the council, was delivered to a commission of *oyer et terminer. Cal. Pat. Rolls,* 16 Hen. VI., p. 199.

committees exercised the special powers of the council, and while the former were assigned to render final judgments, the latter reserved this prerogative to the council.

With these agencies of assistance, in most instances no doubt all that took place in the council was a reading or "rehearsal" of the case, sometimes rendered by the chancellor, as contained in the various written forms which have been described. As was once expressed in the appointment of a commission of inquiry, upon their report nothing should remain for the council but to render judgment.[129] If there were points for discussion these were most easily dealt with when drawn up in a succinct series of articles, which could be discussed and decided one by one.[130] In questions of law the justices were commonly summoned or otherwise communicated with for their advice. Indeed it was repeatedly enjoined by ordinances of Parliament[131] that the lords of the council should not decide legal questions without the aid of the justices. Consultation also with the king as expressed by the words *loquendum est cum rege,* might be made before the final decision. In the council this action was required only as the case was one in which the king was interested, but for a decree in chancery it was always necessary, if for no other reason than to obtain a warrant for the use of the great seal; whereas the privy seal could be used by council authority without further warrant. The final judgment or decree was the one essential matter which must be written in the court. In privy seal cases this was regularly inscribed by the clerk upon the back of the bill; in chancery cases the clerks with greater formality took separate membranes upon which to write a longer review. At this time endorsements were rarely made in chancery cases. In no particular is the distinction between the two courts more clearly drawn than in this technical point. In the reign of Richard II. the names of the councillors present were added by the clerk, and later appear as signatures. The various parchments and papers were then sewn together to constitute the "record and process". Few survive, however, in their original condition. From this record an "exemplification" or abstract upon the rolls of the chancery might be ordered, as was done for instance in the Fanhope case, for in the Privy Seal Office no enrollments of judicial decisions were made.

[129] *Cal. Pat. Rolls,* 26 Edw. I., p. 384.

[130] Close Roll, 40 Edw. III., m. 6 d; an unlisted document, 13 Rich. II., "Exchequer Box".

[131] *Proceedings of the Privy Council,* II. 80, III. 151, 313, IV. 63; *Rot. Parl.,* IV. 506, V. 408 b, etc.

The council and the chancery were in a word courts of summary jurisdiction, proceeding in the words of the canonists *simpliciter et de plano ac sine strepitu et figura judicii.* As such they were appealed to by suitors against the notorious delays of the common law. "To make an end as speedily as possible", "to ordain hasty remedy", to give justice "without delay", were the desire expressed in many petitions. In the main this reputation was deserved, for while the council was difficult of access its cases once taken up were terminated in the shortest time. Thus an unusually extended case, begun on November 7 and continued with several adjournments, was ended on December 18,[132] while the longest duration of a litigation which the writer has observed lasted from July 9 till April 30.[133] Still one reads of cases postponed from day to day, partly heard or not heard at all, for the reason that the lords of the council were otherwise occupied.[134] This was, to repeat, a reason for the separate growth of the court of chancery. It is probable too that great masses of petitions, particularly those seeking relief against the notorious oppressions of the fifteenth century, were not dealt with at all,[135] and that this was a reason why the Star Chamber though continuously operative was unable to cope with the disorders of the time.

Another reason for the inefficiency of the council in this respect seems to lie in a certain timidity and leniency with which it dealt with the greatest offenders. Criminals who could not give security were sent to prison, but men who were rich enough readily found surety, and even from this through channels of favor they too often obtained release. Bondsmen or *mainpernors* no sooner gave security than they were likely to ask to have their obligations cancelled.[136] Moreover, lesser men had small chance in a struggle, when in order to find bonds they must even treat and accord with their enemies.[137] The weakness of the government also in enforcing obedience to the writs has already been mentioned. Not until a more vigorous policy was operative and a new differentiation of the council was made did the Star Chamber exert its full powers.

[132] Case 16 Rich. II., Warrants Privy Seal, series I., section II., file 3.

[133] Spynk case, Patent Roll, 38 Edw. III., pt. I., m. 15.

[134] "De diebus in dies continuate, quia prefati domini aliunde sic protunc occupati quod circa finalem decisionem prefatam litem non poterant." *Proceedings of the Privy Council,* II. 321; III. 36.

[135] I infer this from the fact that a large number are without endorsements or other marks to indicate that they have been heard. Council sessions also frequently ended leaving numbers of petitions undetermined.

[136] For example, Warrants Privy Seal, series I., section II., file 50.

[137] *Rot. Parl.,* IV. 84 a.

With the definitions made by the famous statute, *pro camera stellata*,[138] this chapter on the council and the chancery may be closed.[139] In declaring a class of crimes, namely those of maintenance and violence, to belong especially to the council, it made a clear distinction from the jurisdiction of the chancery; in designating the councillors who were to sit in the Star Chamber, it named a court separate from the chancery; in sanctioning the writs of privy seal and the inquisitorial examinations, it legitimatized the principal features of council procedure; and in declaring that punishment should be effective, it renounced the greatest weakness of the past.

To summarize the evidence which has been produced, the history of the council may be regarded as a series of special phases and differentiations, which were necessary from its ever-enlarging responsibilities. Of these phases the earliest, which has been described as the " council at the exchequer ", was superseded by the " council in chancery ", which was the dominant form of the fourteenth century. The later operation of the council on the inner lines afforded by the privy seal was found more expedient in the sphere of politics and in a certain field of justice. This became the dominant form of the fifteenth century. At the same time the older relations with the chancery continued, with a gradual tendency toward separation and independence. Not until the sixteenth century could the chancellor be said to be quite free of all association with the council.

JAMES F. BALDWIN.

[138] Statutes. 3 Hen. VII., c. 1.

[139] That the statute did not have the effect intended it is not necessary for me to argue. See Schofield, *Study of the Court of Star Chamber* (Chicago, 1900).